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No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

FRANK E. COOPER, AS TRUSTEE OF WAUCHULA CENTRAL PHARMACY, INC., A BANKRUPT, PETITIONER,

VS.

R. F. DASHER, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT.

The petitioner, Frank E. Cooper, as trustee in bankruptcy in the matter of Wauchula Central Pharmacy, Inc., a bankrupt, prays that a writ of certiorari issue to review the decree of the United

States Circuit Court of Appeals for the Fifth Circuit entered on March 10, 1933 (R. 60), affirming in part and reversing in part an order of the District Court of the Southern District of Florida entered on April 26, 1932 (R. 35-37), which had affirmed an order of the referee of that District Court dated December 10, 1931 (R. 19-28), requiring respondent to turn over certain assets of the bankrupt.

QUESTION PRESENTED.

The question presented is single:

Whether a turnover order in bankruptcy requiring a bankrupt or his agent to deliver to the trustee assets of the bankrupt which describes the property to be delivered:

(a) By its cost price to the bankrupt;

(b) By its value;

(c) By its being exclusively merchandise purchased by and delivered to the bankrupt and withheld by a named agent at date of bankruptcy;

(d) By its being of a class of merchandise shown by the proofs of claim in bankruptcy to have been charged to the bankrupt; and,

(e) By its being of the class of merchandise usually carried for sale in a retail drug store of the character operated by the bankrupt,

is void for uncertainty in the description of the merchandise?

STATEMENT OF THE CASE.

On February 26, 1931, amended involuntary petition in bankruptcy was filed by certain creditors against Wauchula Central Pharmacy, Inc., on grounds among others of recent transfers of corporate assets to respondent Dasher, the corporation's president (R. 5), and of concealing other assets (R. 6 and 7). Adjudication followed March 21, 1931 (R. 11). Thereafter the petitioner herein, having qualified as trustee, filed petition before the referee showing that Dasher was sole custodian of the corporation's assets and that he withheld merchandise, or the proceeds thereof to the amount of $23,101.84 from the trustee and praying for a rule on him to show cause why he should not turn the same over (R. 12-15). Respondent answered denying the referee's summary jurisdiction because, among other reasons, the property delivery of which trustee sought was not sufficiently specifically described to admit compliance on his part and generally denying possession or control of any property of the bankrupt (R. 16-18). Voluminous testimony was taken which is not in the record (R. bottom 19, top 20).

On December 10, 1931, the referee entered his order (R. 19-28) finding that the great bulk of the assets recovered by the receiver at the institution of bankruptcy were taken from secret hiding places (some of them far in the woods), (R. 20-21) whose existence was concealed from all other employees of the corporation save Dasher, to which it had been moved in the nighttime within a few days before bankruptcy (and some

even after the petition had been filed) (R. 21) by other trucks than those usually employed in his business (R. 22) in original containers (but with all marks of identification defaced) (R. 22) and in repacked and re-inventoried cartons (R. 22), a veritable wholesale stock owned by a little country drug store and when bankruptcy intervened in a state of flux between garages, bedrooms, dairy sheds and deserted shanties in the woods, all, however, under the guiding genius of Dasher its exclusive custodian (R. 22); that during the merchandise fluxation Dasher had by sham bill of sale placed title to the store fixtures in his individual name as well as the lease on the corporation's only place of business (R. 22-23); that some seven months after bankruptcy some eight boxes of cigars from the bankrupt's stock were found in Dasher's possession (R. 22 and 27) and that his home was largely furnished with bankrupt's property—rugs, towels, bed clothes, wearing apparel, electric fixtures, etc., (R. 22 and 27).

With these findings as background to throw light on any question of premeditated fraud as opposed to inadvertence the referee further found: that Dasher was at all times sole custodian of the bankrupt's merchandise; that the corporation started business nine months before bankruptcy with merchandise worth at least $8,500.00 (this was Dasher's own figure on the stand—his books showed more); that it received during its nine months life new merchandise costing it $64,051.82 (this from books kept by Dasher himself); making a total merchandise received of $72,551.82; that it sold merchandise of a *retail* value of $30,741.34 which

from Dasher's testimony included a profit of $7,685.33, leaving a *cost* value of merchandise sold of $23,056.01 with which he was credited; that the actual *cost* value of merchandise seized by the bankruptcy court (after all allowance for possible error) amounted to $29,754.46 with which he was credited; making the total merchandise accounted for of $52,810.47, and unaccounted for of $19,741.35. Thereupon the referee ordered the delivery of the cigars, rugs, bed clothes, clothing, fixtures, etc., (whose specific description he had been able to discover because they had been located) by that specific description (R. 26-27) and deducting their value —$583.69—from the shortage, determined that the remainder of the shortage was merchandise of a cost price value of $19,157.66 "of a class of merchandise shown by the proofs of claim to have been purchased on the credit of the bankrupt corporation and delivered to it, and, of such a class of merchandise as is usually carried and sold in a retail drug store, but which is not capable of a more specific description, such more specific description being known only to the respondent in this cause" (R. 26) and ordered respondent to turn over such "goods, wares and merchandise of the said bankrupt corporation purchased and owned by the said bankrupt corporation, and withheld from the officers of this Court at the time of bankruptcy by the said R. F. Dasher, of a value of $19,157.66, said goods, wares and merchandise being of the character of goods, wares and merchandise such as is shown by the proofs of claim in this cause to have been purchased by the bankrupt corporation and such as is usually carried, sold,

and offered for sale in drug stores of the character operated by the bankrupt corporation prior to bankruptcy, and being exclusively goods, wares, and merchandise purchased by and delivered to the said bankrupt corporation and withheld by the said R. F. Dasher from the officers of this Court at the time of bankruptcy" (R. 28).

The district judge on review affirmed the referee's order in its entirety April 26, 1932 (R. 35-37).

On appeal, however, the Circuit Court of Appeals for the Fifth Circuit (Judges Bryan, Foster and Hutcheson, sitting) reversed that part of the order for the $19,157.66 in value described by the general description and affirmed it only as to the $583.69 in value minutely described by items (R. 60) expressing the opinion (Judge Hutcheson writing) that the order was void as to the $19,157.66 worth of merchandise described generally for uncertainty of description (R. 56).

The Circuit Court of Appeals was deprived of a proper brief of appellee (petitioner here) by failure of appellant (respondent here) to furnish a copy of his brief on time and failure to file it until the day before appellee's reply thereto was due. Our brief below was, therefore, hastily prepared and incomplete. Motion to dismiss the appeal for appellant's failure to observe the rule in filing brief (R. 53) was denied (R. 57).

STATUTES INVOLVED.

The authority for the proceeding is found in ~~Chapter 2,~~ Section ~~11~~ 2 of the Act of Congress relating to bankruptcy of July 1, 1898, as amended, (Title 11 Sec 11 U.S.C.A.) subsection (7), empowering courts of bankruptcy to:

> "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;"

and, subsection (15) authorizing such courts to:

> "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

REASONS FOR GRANTING THE WRIT.

I. **Conflict of Decisions Between Circuits.**—The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case, while in harmony with the decision of the Ninth Circuit (*Re Miller & Harbaugh*, 54 Fed. (2d) 612), is in conflict with the decisions of the Second Circuit (*In re D. Levy & Co.*, 142 Fed. 442, 73 C. C. A. 558; In Re H. Magen Co. 10 Fed (2) 91 *In re Prela*, 23 Fed. (2d) 413); the Third Circuit (*Epstein* v. *Steinfeld*, 210 Fed. 236, 127 C. C. A. 54; *Hirsch* v. *Schilling*, 28 Fed. (2d) 171;

In re H. Magen Co., 10 Fed. (2d) 91; *Sheinman* v. *Chalmers*, 33 Fed. (2d) 902; *In re Cohan*, 41 Fed. (2d) 632); and the Fourth Circuit (*Kirsner* v. *Taliaferro*, 20 Fed. 51, 120 C. C. A. 305). In fact, the court below in its opinion cites only two authorities outside its own circuit for its holding *Re Miller & Harbaugh, supra*, in which the Ninth Circuit Court of Appeals invites review by this Court in these words:

> "It must be conceded that our decision is in direct conflict with the decision of the Circuit Court of Appeals of the Fourth Circuit. We call attention to this conflict in order that it may be considered by the Supreme Court" (Text 616).

and, *In re Goldman*, 62 Fed. (2d) 421, in which the Circuit Court of Appeals of the First Circuit says:

> "The District and Circuit Courts of Appeals are not in entire accord as to the form which the turnover order may take" (Text 424).

II. Conflict With Decision of This Court.—It is respectfully submitted that the Circuit Court of Appeals herein has decided an important question of federal law in a way probably in conflict with an applicable decision of this Court, to-wit: Prela vs. Hubshman, which is reported jointly with *Oriel* v. *Russell* in 278 U. S. 358, 73 L. Ed. 419. In the Prela case it appears that the turnover order there enforced by contempt proceedings was no more definite than

that in the case at bar, and certainly would not have passed the test which the Fifth Circuit lays down in its opinion below. Authorities cited and approved in the opinion of this Court in the Prela case, we think also sufficient to justify the inference that this Court in that opinion intended to adopt the rule applied in the Second, Third and Fourth Circuits.

III. Important Question of Federal Law Which Should Be Settled.—If the Prela case did not decide the important question of federal law involved in the instant case, to-wit: Whether bankruptcy courts are powerless to compel delivery of assets which, because of the fraud of the bankrupt, cannot be particularly and minutely described in the turnover order, it is respectfully submitted that this important question of federal law should be settled by this Court. With bankruptcy courts taxed to their utmost by the present volume of failures, with the business world stunned at the amount of fraudulent concealments bankrupts are able successfully to accomplish, it is important that a uniform rule be laid down by this Honorable Court to determine just how effective or how impotent the processes of the bankruptcy courts may be in gathering secreted assets of bankrupts. Referees and trustees, throughout the nation, are daily faced with the problem: Can they demand delivery of concealed assets which only the person who conceals them can describe with minute

particularity? It is submitted that this Court should by its decree establish a uniform answer to that question.

Wherefore, it is respectfully submitted that this petition for certiorari to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit should be granted.

C. EDMUND WORTH,
Counsel for Petitioner.

Dated April 15, 1933.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the referee, Honorable H. P. Baya, is incorporated in his order (R. 19-28). The district judge expressed no opinion except to confirm the referee's holding (R. 35-37). The opinion of the Circuit Court of Appeals (Circuit Judges Bryan, Foster, and Hutcheson sitting—Judge Hutcheson writing) was filed March 10, 1933, and appears in the transcript of the record at pages 56 to 60.

Jurisdiction.

The jurisdiction of this Court is based upon Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. C. A. Title 28, Section 347.

The date of the decree, of which review is sought in this proceeding, is March 10, 1933 (R. 60).

Statement of the Case.

The facts have been stated in the petition which this brief accompanies (see pages 1 to 10, *ante*).

Summary of Argument.

As stated in the petition, but one question is presented:

> "Whether a turnover order in bankruptcy requiring a bankrupt or his agent to deliver to the

trustee assets of the bankrupt which describes the property to be delivered:

(a) By its cost price to the bankrupt;

(b) By its value;

(c) By its being exclusively merchandise purchased by and delivered to the bankrupt and withheld by a named agent at date of bankruptcy;

(d) By its being of a class of merchandise shown by the proofs of claim in bankruptcy to have been charged to the bankrupt; and,

(e) By its being of the class of merchandise usually carried for sale in a retail drug store of the character operated by the bankrupt

is void for uncertainty in the description of the merchandise."

The decision of the Circuit Court of Appeals answered this question in the affirmative. It is submitted that this decision presents:

(1) Conflict of decisions between circuits.

(2) Conflict with decision of this Court.

(3) An important question of federal law which should be settled.

The question will be discussed from these three aspects.

ARGUMENT.

I.

Conflict of Decisions Between Circuits.

The Ninth Circuit.

It must be conceded that the decision of the Circuit Court of Appeals in the instant case is supported by the opinion of *In re Miller & Harbaugh*, 54 Fed. (2d) 612, from the Ninth Circuit. While the order in that case was possibly not so specific as the one here involved the language of the opinion is broad enough to rule the order in the instant case fatally deficient. As we have seen, the opinion in that case called this Court's attention to its conflict with the decision of another circuit (Text 616).

The First Circuit.

But, while the Ninth Circuit and the Fifth Circuit hold that a turnover order in this form is void, we think no other circuit so holds. It is submitted that *In re Goldman*, 62 Fed. (2d) 421, cited below, does not commit the First Circuit to that view. As we read the Goldman case it goes off on the rule that where the referee find only that the bankrupt is concealing assets "in some form" (Text 423), with no finding as to whether it is "merchandise, real estate, bills receivable, or money, or assets in some other form" (Text 424), he could not force the bankrupt

to turn over the shortage *in money*. This, we thought, until the present decision, was the rationale of *Samel* v. *Dodd*, 142 Fed. 68, 73 C. C. A. 254, as interpreted in *Stuart* v. *Reynolds*, 204 Fed. 709, 123 C. C. A. 13, and the rule in the Fifth Circuit, although we recognized that Judge Shelby, formerly of that bench, in separate concurring and dissenting opinions in these cases, as well as *In re Purvine*, 96 Fed. 192, 37 C. C. A. 446, did strongly urge the lack of power in the bankruptcy court to issue turnover orders except where they were so specific in themselves that they would enable the marshal positively to identify the goods from the description in the order. But, it was not until the instant case that the majority of the Court in the Fifth Circuit seems to have concurred in these views. In fact, *Regus* v. *Morrison*, 30 Fed. (2d) 685, 22 Fed. (2d) 804, when read in connection with the record in that case, clearly indicates the contrary. The order in the instant case does not offend against the holding of the First Circuit in the Goldman case, for here *merchandise* was concealed and *merchandise* was ordered turned over. And, it is interesting to observe that one of the three judges of the First Circuit even dissented from the Goldman decree on the ground that under the decision of this Court in the Prela case, cited *infra*, the order was good.

On the other hand, Circuit Courts of Appeals in the Second, Third and Fourth Circuits have sustained turnover orders very similar to the one in the case at bar as being sufficiently definite.

THE SECOND CIRCUIT.

While we do not have available verbatim the turnover order *In re Levy & Co.*, 142 Fed. 442, 73 C. C. A. 558, from the Second Circuit, it is apparent from the opinion that it could have been no more specific than the one here involved and that it was arrived at by similar proof except that it was not supported by the background of fraud which is found in the instant case. Later, that court decided *In re* Prela which is discussed hereafter under the holdings of the Supreme Court. See also In re Magen 10 Fed(2) 91, from this circuit, discussed in next paragraph, through error.

THE THIRD CIRCUIT.

In the Third Circuit authority for our position is ample. In *Epstein* v. *Steinfeld*, 210 Fed. 286, 127 C. C. A. 54, the order of the referee seems to have commanded the turnover of:

> "3,061 dozen waists and 8,031-7/8 yards and 10,750-5/12 dozen trimmings *of a value of $28,686.34* forthwith, which property the said bankrupt had in his possession at the time of the filing of the petition against him, and which he withheld from the trustee *and still withholds.*"
>
> (See 206 Fed. Text 568 and 570, and 210 Fed. 236, Text 236.)

The district judge struck the italicized words and the Circuit Court of Appeals affirmed his decision.

In *Hirsch* v. *Schilling*, 28 Fed. (2d) 171, the referee's order, taken from page 45 of the printed transcript in the Circuit Court of Appeals, recites the trustee's petition for:

> "property belonging to this estate of the value of $20,000 and upwards * * * or the reasonable money equivalent for said property";

and the referee's report, taken from pages 42 to 44 of said transcript, shows that the method of proof was identical with that in the case at bar; and the order was, that Hirsch pay over

> "the sum of $10,000 for merchandise and property belonging to this estate and found to be in his possession and under his control and concealed by him" (T. p. 46, Opinion, p. 172).

This was affirmed.

In *In re H. Magen Co.*, 10 Fed. (2d) 91, the referee found the respondent had:

> "assets belonging to this estate in bankruptcy herein, consisting of silk and cotton yarn of the value of $32,779.74" (Text 95).

and ordered delivery by the following description:

> "the said silk and cotton yarn of the value of $32,779.74, or, at the option of the respondent, in lieu of the said merchandise, to pay to the said trustee, within the said period of five days, the sum of $32,779.74 in cash" (Text 92).

In the second headnote, the holding of the Circuit Court of Appeals is thus digested:

> "Turnover order may properly issue, though no definite property or money is found in bankrupt's possession, where proved facts warrant inference that there is a withholding or concealment of assets unaccounted for."

This case is from the second C.C.A.

This language perhaps goes a little further than the opinion, but, we submit, the opinion goes far enough to sustain the case at bar.

In *Sheinman* v. *Chalmers*, 33 Fed. (2d) 902, the decree which was affirmed described the property to be turned over as follows:

> "cash to the amount of $32,751.17, and goods and merchandise of the kind usually carried by said bankrupt in cotton and woolen business formerly conducted by him, consisting of blankets, cloths, cretonnes, chiffons, crash, curtains, flannels, ginghams, linens, lineens, muslins, *etc., etc.,* and *similar merchandise* of the total value of $34,447.64, money and property which the said bankrupt had and which formed part of his bankrupt estate at the time the petition in bankruptcy herein was filed against him and which he has failed to turn over to his said Trustee" (Transcript in C. C. A. p. 56) (italics supplied by us).

The affirmance of that order by the Circuit Court of Appeals was expressly made:

> "keeping in view the principles of *Oriel* v. *Russell, supra*" (Text 904).

In *In re Cohan*, 41 Fed. (2d) 632 the referee's order directed the delivery of:

> "goods or merchandise consisting of shoes, overshoes, boots, socks, hose and other footwear, to the value of $52,397.61, or the proceeds thereof, which came into his possession between January 1, 1928, and January 5, 1929, and which he had in his possession or under his control January 5, 1929—the date he filed his petition—and which he concealed or otherwise failed to turn over to his trustee" (Opinion 632, or C. C. A. Transcript p. 317).

The order of the district judge was simply for:

> "said concealed assets, consisting of goods and merchandise to the amount of $52,397.61, or the proceeds thereof" (C. C. A. Transcript p. 318).

Contrary to the apparent belief of the writer of the opinion in the Miller & Harbaugh case, *supra*, the question of the form of the order was distinctly presented on that appeal by an assignment of error reading as follows:

> "7. The order entered against the bankrupt in this case is vague and indefinite as to the kind and character of merchandise required to be turned over and there is no sufficient finding of fact to support it."
>
> (Transcript C. C. A. p. 321.)

But, this order was held valid.

THE FOURTH CIRCUIT.

The case of *Kirsner* v. *Taliaferro*, 202 Fed. 51, 120 C. C. A. 305, clearly brings the Fourth Circuit to the support of the order in the instant case. There, according to the opinion (p. 53) the order required the delivery of:

> "goods and merchandise of the character and class heretofore carried by him, being dry goods, notions, and ladies' ready-made clothing to the value of at least $4,166.54 wholesale price."

The Court dismissed the contention that this order was too indefinite a description in this language:

> "The bankrupt says that there was error because the court below undertook to decree against him for certain goods without specifying or describing in any manner the same so as to enable him to know how or in what manner to

> comply with said order. The goods were described as such as he had carried in his stores, namely, dry goods, notions, and ladies' ready-made wear of the cost or wholesale price of $4,166.54. This was sufficiently definite" (Text 57).

Incidentally, this case was the one which the Ninth Circuit thought went too far, but was one of those which this Court in its opinion *In re Prela, supra,* cited as "indicating a hesitation and great reluctance" to enforce compliance with a turnover order (278 U. S. Text 365).

II.

Conflict With Decision of This Court.

It is respectfully submitted that the Circuit Court of Appeals' decision herein misapplies and conflicts with the holding of this Court in *Prela* v. *Hubshman,* which is reported in 278 U. S. 358, 73 L. Ed. 419. In that case the order, as revealed by the record filed in this Court, commanded the turnover of certain cash and merchandise, the merchandise being described as follows:

> "Goods, wares and merchandise, consisting of 6,099¼ yards of silk, or the sum of $8,387.20, as the cash value thereof."
>
> (See Record in this Court, 1928 Term, Case No. 91, pp. 6 and 10.)

Yet, this Court did not hold that order void (for, surely failure to obey a void order could not be contempt), but held that such order was conclusively valid on the collateral attack attempted in the subsequent proceedings.

Furthermore, this Court in that opinion speaking through the Chief Justice cites some eight model cases as seeming "to lay down more nearly the correct view" (Opinion, p. 364). Of these cases, four are from the Third Circuit, including *Epstein* v. *Steinfeld, supra,* and one is from the Second Circuit, each of which circuits, as we have seen, unquestionably uphold the petitioner's position in the instant case. None are included from the Fifth or Ninth Circuits.

The only reference in the opinion of this Court in the Prela case to the views of the Fifth Circuit is the suggestion of this Court that its decision indicates "a hesitation and great reluctance to issue orders of commitment where there be any reasonable doubt of the ability of the bankrupt to comply" (p. 365) as exemplified by the case of *Stuart* v. *Reynolds,* 204 Fed. 709, 123 C. C. A. 13, which case but reiterated the view which that Court had expressed in *Samel* v. *Dodd,* 148 Fed. 68, 73 C. C. A. 254, and perhaps was not quite so "reluctant" even as was the Samel vs. Dodd decision. Yet, it is largely its decision in the Samel vs. Dodd case on which the lower court relies in the case at bar.

In the Prela case the views of the Fourth Circuit, as expressed in *Kirsner* v. *Taliaferro, supra,* were likewise characterized as too "hesitant" and "reluctant," and, yet, the Fourth Circuit held in that case, as we have seen, that it was not so reluctant as to hold an order like one in the case at bar void for indefiniteness.

Incidentally, the opinion in *Prela* v. *Hubshman*; and *Oriel* v. *Russell*, *supra*, concludes with an extended quotation from the language of Justice McPherson of *In re Epstein*, 206 Fed. 568, on behalf of vigorous enforcement against fraudulent bankrupts, this being the same case as *Epstein* v. *Steinfeld*, 210 Fed. 236, 127 C. C. A. 54, *supra*.

It is submitted, therefore, that the Ninth Circuit decision in the Miller & Harbaugh case, *supra*, on which the lower court herein relied, while it attempted to distinguish many lower court holdings, completely overlooked in its discussion of the opinion of this Court in 278 U. S. 358 the fact that *In re* Oriel was not the only case therein involved, and failed to note that the facts in Prela vs. Hubshman, to which the language of this Court is equally applicable, betrayed a conflict with their construction of this Court's holding, and that the Circuit Court of Appeals of the Fifth Circuit in the case at bar has probably fallen into the same error. Rather do we think that the opinion of District Judge Patterson in *In re Ginsburg*, (D. C. N. Y. 50 Fed. (2d) 240), where the referee's order commanded the delivery of:

> "underwear, gloves, and dry goods of the value of $13,424.86"

properly interpreted the opinion of this Court in the Oriel and Prela cases. The proof in the Ginsberg case paralleled that in the case at bar except that there was no evidence of fraud to fortify it such as we have here. Said the judge in that case:

"I do not regard the Oriel case as discountenancing proof of this kind or as requiring from now on the testimony of unimpeachable eyewitnesses who saw the bankrupt removing his goods by stealth. The proof furnished by the trustee was of the same character as that heretofore given in many cases in this circuit, where turnover orders were issued, and the general rule here has for many years been the same as that recently laid down by the Supreme Court in the Oriel case —proof of a clear and convincing character, a mean between the extremes of mere preponderance and proof beyond reasonable doubt. I think that the referee gave full effect to the Oriel case when he went along with the bankrupt as to every matter in which the latter gave any tangible figures tending to explain the large discrepancy, and this despite the poor opinion which he had formed of the bankrupt's credibility" (Text 241).

III.

An Important Question of Federal Law Which Should Be Settled.

If we are in error in thinking that the Prela case in this Court settled this question contrarily to what the lower court has held in the instant case, we submit that it is of vast importance for referees and trustees to have a definite rule laid down by this Court as to when they can force a defrauding bankrupt to account for the assets which he withholds from his trustee in bankruptcy. There probably was never a time in the history of the Federal Bankruptcy Statute when bankruptcy cases were more numerous than today, and, there probably was never a time when referees were more often confronted with the problem of how to obtain possession of secreted assets of bankrupts.

If it be true, as the lower court in the instant case has in effect held, that the order must be so definite in its description of the goods and property which the embezzling bankrupt has secreted that one could tell from the four corners of the order exactly whether each and every article tendered was one of the articles called for, if it be true that any order to turn over assets of a given cost price and value which have been clearly proven to be withheld by a general description of the class of merchandise of which they consist and as being a part of the merchandise shown to have been charged to the bankrupt by his records and by the proofs of claim is so indefinite that "it describes nothing, it identifies nothing" (R. 59), and is "void" (R. 60), then unscrupulous and dishonest bankrupts will be multiplied and courts of bankruptcy will become mere automatons to enable the fraudulent to reap the benefit from a statute which was enacted to benefit only the oppressed.

We submit that particularly where the shortage is established by records kept by the respondent himself, and by his own testimony on the stand as the referee's opinion shows it was established in the instant case, and, where that conclusion is fortified by proof beyond a doubt that at the very day of bankruptcy he was moving most of the remainder of his assets under cover of nighttime to other hiding places, and where the trail of fraud shows that he was transferring the bankrupt's fixtures and leasehold to himself, and where the merchandise, which the trustee found in out of the way places, has all identification marks defaced and is

inventoried ready to establish other drug stores, and where seven months after bankruptcy certain portions of the very merchandise which the accounting showed was missing turns up in the possession of the defaulter, so that inadvertence or mistake is completely excluded, it is going a long way to say that a court which is authorized to "cause estates of bankrupts to be collected" must stop short in its power until it can name the number, package size, and manufacturer's brand of each drug and toilet preparation which has been withheld before it can order the same to be delivered by the defrauder.

Hence, we respectfully submit that this important question of whether the bankruptcy courts are impotent, except when they can set forth a description as particular as a levy on an execution, should be determined by the final interpreter of federal statutes—the Supreme Court of the United States.

Conclusion.

It is, therefore, respectfully submitted that the instant case is one calling for the exercise by this Court of its supervisory power in order that the error pointed out herein may be corrected; that the law may be properly and accurately defined; that the judgment of the referee and the district judge may be affirmed and that of the Circuit Court of Appeals for the Fifth Circuit reversed; and that to such end that the writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Fifth Circuit, and, finally reverse it.

All of which is respectfully submitted.

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